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26 MAY 1998

Paper No. 82

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE
OF THE T.T.A.B.

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Allied-Sysco Food Services, Inc.
v.
The Pizza Maker, Inc.

See
J. 10/1/97
of 1

Cancellation Nos. 21,309 and 21,321

"Emergency Motion Rule 60(B)"
and Respondent's Reply Brief

Paula D. Morris of Rosenblatt & Associates for Allied-Sysco
Food Services, Inc.

Mark O'Brien, President of The Pizza Maker, Inc., for The
Pizza Maker, Inc.

Before Cissel, Hanak and Hohein, Administrative Trademark
Judges

Opinion by Cissel, Administrative Trademark Judge:

The final decision of this Board was issued on July 10,
1997. The petitions to cancel the two registrations were
granted because respondent had failed to make of record
either testimony or evidence to overcome the inference that
it had failed to use the registered marks during the two
years before the November, 1992 filings of the petitions to

cancel. The Board noted, at page 8 of its opinion, that "[t]he record is replete with attempts by petitioner to get respondent to provide proof of the use it claims during the period petitioner questions, but respondent steadfastly refused to support its contention with documentary evidence." We acknowledged that Mr. O'Brien may have misunderstood his obligation to provide petitioner with the evidence that might have met his burden to overcome the evidence showing abandonment, but we nevertheless found that his stubborn refusal to do so necessarily resulted in our findings for petitioner in both proceedings. We noted that Mr. O'Brien is not an attorney, and suggested that his unfamiliarity with the applicable rules of procedure contributed to the protracted problems with discovery and the overly extensive record in these proceedings. Counsel for petitioner, on the other hand, was commended for the patience and flexibility displayed in attempting to abide by the rules without unnecessarily confusing respondent.

In keeping with his consistent failure to comply with the applicable rules of civil procedure or the Trademark Rules of Practice, on September 8, 1997, almost two months after the final decision had been rendered on the merits, Mr. O'Brien filed a "Reply Brief," attached to which were additional documents. On the same date, he also filed a paper styled as a "Supplement to Emergency Motion Rule

60(B).” The Board had already received from petitioner, on August 21, 1997, petitioner’s response to the “Emergency Motion.”

The Board was unable to document receipt of the original “Emergency Motion,” so respondent was contacted by telephone, and eventually respondent submitted a copy of the motion, along with a letter to the Board in which Mr. O’Brien explains that unless the Board reverses its July 10, 1997 judgment, respondent will appeal, and the burden of doing so “may put The Pizza Maker Inc. out of business.”

The reply brief and the materials attached to it have not been considered. While Rule 2.128 of the Trademark Rules of Practice neither provides for nor prohibits consideration of reply briefs from parties in the position of defendant, the submission of respondent’s reply brief was manifestly untimely, having been received over a year and a half after its earlier-filed reply brief was stricken on January 17, 1996. Moreover, the second reply brief was filed almost two months after the final decision on the merits had been rendered in this matter. The record had long since closed, so even if the brief had been timely, the materials attached to it would not have been considered.

We turn, then, to the “Emergency Motion Rule 60(B).” Rule 60(b)(2) of the Federal Rules of Civil Procedure provides for relief from judgment in view of “newly

discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." The motion, which respondent apparently served on petitioner, if not the Board, makes no mention of the reason the evidence submitted along with it was not revealed during the discovery or trial periods. In the "Supplement" to the motion, which respondent apparently filed in response to petitioner's response to the motion, respondent appears to contend that the reason it did not produce the evidence attached to the motion "in the original cancellation proceeding" was because the "majority" of the documents were "lost," and that they were later found in a briefcase after renovations at respondent's headquarters. Respondent is not at all clear about how this occurred. No information as to the timing of the renovations relative to the discovery and trial periods in these proceedings is given. No supporting documentation is provided regarding the renovation, how the documents were stored, or who found them, or under what circumstances, and there is no explanation at all concerning why these materials could not have been timely produced through the exercise of due diligence.

Under these circumstances we cannot conclude that respondent is entitled to what amounts to a reopening of the trial period in this proceeding in order to introduce evidence which could have been uncovered and produced years

Cancellation No. 21,309

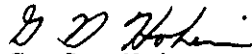
ago during discovery. Respondent's motion under Rule 60(b) is accordingly denied.



R. F. Cissel



E. W. Hanak



G. D. Hohein

Administrative Trademark Judges,
Trademark Trial and Appeal Board

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